



1 Assuming that AEDPA's statute of limitations may be equitably tolled, it is available  
 2 "only when 'extraordinary circumstances beyond a prisoner's control make it impossible to file a  
 3 petition on time.'" *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005),  
 4 quoting *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). "Generally, a litigant seeking  
 5 equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his  
 6 rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v.*  
 7 *DiGuglielmo*, 544 U.S. 408, 418 (2005). The petitioner must show that the extraordinary  
 8 circumstances caused the untimeliness. *Spitsyn v. Moore*, 345 F.3d at 799.

9 Petitioner contends his placement in Ad-Seg at Pleasant Valley State Prison in July or  
 10 August of 2005 until his release from SHU at Corcoran State Prison on June 28, 2006 was an  
 11 extraordinary circumstance preventing him from timely filing his federal petition. Resp. to Opp.  
 12 at 2. "Transfers between prison facilities, solitary confinement, lockdowns, restricted access to  
 13 the law library and an inability to secure court documents do not qualify as extraordinary  
 14 circumstances." *Lindo v. LeFever*, 193 F.Supp.2d 659, 663 (E.D.N.Y. 2002.) To the extent  
 15 petitioner caused his own placement in Ad-Seg or SHU, the placements were not circumstances  
 16 beyond his control. *Espinoza-Matthews v. California*, 432 F.3d at 1026. In *Espinoza-Matthews*,  
 17 the petitioner was placed in Ad-Seg for his own protection after another prisoner assaulted and  
 18 slashed him. *Id.* at 1023 & 1028 n. 7.

19 Moreover, petitioner has failed to demonstrate that he pursued his claims diligently  
 20 when he was not in Ad-Seg or the SHU. The obligation to act diligently does not pertain solely  
 21 to the filing of the federal habeas petition, but exists during the period the petitioner is  
 22 exhausting state remedies as well. *Roy v. Lampert*, 465 F.3d 964, 972 (9th Cir. 2006). Petitioner  
 23 had four or five months between the denial of his petition for review of the direct appeal in the  
 24 California Supreme Court on March 16, 2005, and his placement in Ad-Seg in July or August of  
 25 2005. *Cf. id.* (petitioners diligently pursued claims before external impediment existed). After  
 26 petitioner was released from SHU in Corcoran on June 28, 2006, he waited three months to file  
 27 his state habeas petition in the California Supreme Court. The petition was pending for seven  
 28 months. After the California Supreme Court denied the petition, petitioner waited another three

1 months to file the instant petition. The petitioner in *Pace v. DiGuglielmo*, 544 U.S. at 418-19,  
 2 failed to demonstrate the requisite diligence because he not only waited years before seeking  
 3 postconviction relief, he then waited five months after finality of his postconviction proceedings  
 4 before seeking relief in federal court.

5 Petitioner contends that when he was placed in Ad-Seg at Pleasant Valley State Prison,  
 6 his personal property and *some* legal documents were missing, and he was not given access to *all*  
 7 of his legal materials. Resp. to Opp. at 2. He adds that he still has not received all of his  
 8 property. Resp. to Opp. at 3. Petitioner fails to describe what legal materials he had and what  
 9 legal materials were missing, or explain what claims the missing legal materials prevented him  
 10 from raising and how he was prevented from raising them. Since all the claims petitioner raised  
 11 in the petition—he received ineffective assistance of defense and appellate counsel because there  
 12 was insufficient evidence of his crime, he did not receive *Miranda* warnings, and the trial court  
 13 erred in denying his motion to withdraw his plea—involve facts and issues petitioner has known  
 14 since his conviction, the lack of some legal materials did not prevent timely filing. *United States*  
 15 v. *Battles*, 362 F.3d 1195, 1198 n. 5 (9th Cir. 2004) (issues in petition may show lack of  
 16 transcript did not actually delay filing of petition).

17 In any event, petitioner was able to file a state petition and the instant petition although  
 18 he claims he still has not received all of his property. Delay in obtaining a transcript does not  
 19 justify tolling where the transcript is not necessary to file the petition. *Donovan v. Maine*, 276  
 20 F.3d 87, 94 (1st Cir. 2002). In *Gassler v. Bruton*, 255 F.3d 492, 495 (5th Cir. 2001), a six-month  
 21 delay in obtaining the trial transcript was not a basis for equitable tolling where the petitioner  
 22 waited five months longer to seek post-conviction relief in state court, the transcripts were not  
 23 necessary to filing, and the petitioner failed to explain what claims he was unable to make  
 24 without a complete transcript.

25 The appeal form attached to petitioner's response demonstrates that he did not  
 26 diligently seek the legal materials that had allegedly been missing since his placement in Ad-Seg  
 27 in July or August of 2005. The form states that petitioner complained that on April 21, 2006, he  
 28 received little of his property, after petitioner was in the SHU at Corcoran. Resp. to Opp., Ex. A

1 at 1. The appeal form shows petitioner never complained that his legal materials were not  
2 provided. *Cf. Espinoza-Matthews*, 432 F.3d at 1027-28 (petitioner diligently attempted to obtain  
3 legal material while in Ad-Seg). Petitioner complained that he was not able sort through his  
4 property and choose what incoming mail, photographs, or magazines he could keep, and that he  
5 was required to pay the postage to mail his remaining property home. Resp. to Opp., Ex. A. at 1-  
6 2, & Attachment E. Petitioner stated that he received two bags, including a television. Resp. to  
7 Opp., Ex. A at 2. Petitioner's failure to seek his legal materials demonstrates a lack of diligence  
8 inconsistent with equitable tolling. The attachment also indicates that petitioner's property was  
9 not missing until his transfer to Corcoran.

10 Petitioner contends he had inadequate access to the law library while in the SHU at  
11 Corcoran, although he concedes he went to the law library "at least twice while housed in  
12 Corcoran (SHU)." Resp. to Opp. at 3. Restricted access to the law library is not an  
13 extraordinary circumstance justifying equitable tolling. *Lindo v. LeFever*, 193 F.Supp.2d at 663.  
14 "[T]he Constitution does not require that prisoners (literate or illiterate) be able to conduct  
15 generalized research, but only that they be able to present their grievances to the courts." *Lewis*  
16 *v. Casey*, 518 U.S. 343, 360 (1996). Notably, petitioner was in the SHU at Corcoran only three  
17 and a half months, and actually went to the law library at least twice during that period. Resp. to  
18 Opp. at 2. Petitioner's restricted access to the law library for a three and a half month period does  
19 not warrant equitable tolling.

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## CONCLUSION

Accordingly, respondent respectfully requests that this Court dismiss the petition for writ of habeas corpus with prejudice.

Dated: April 22, 2008

Respectfully submitted,

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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **Hughes v. Adams, Warden**

No.: **C 07-4442 CRB (PR)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On April 22, 2008, I served the attached

**REPLY TO OPPOSITION TO MOTION TO DISMISS HABEAS CORPUS PETITION AS UNTIMELY**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

Daylen Jason Hughes  
V22456  
3C05 #103 Low  
P.O. Box 8800  
Corcoran, CA 93212

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 22, 2008, at San Francisco, California.

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M. Argarin

Declarant

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/s/ M. Argarin

Signature